

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 51/2003

1. Mr. Fernando Pinto alias Fernando
Manuel Pinto, son of Manuel Salvador
Pinto, unmarried, aged 78 years,
residing at Quitula, Salvador do Mundo,
Bardez, Goa.
 2. Miss Robertina Carmelina Pinto alias
Robertina Pinto, daughter of Manuel
Salvador Pinto aged 73 years,
residing at Quitula, Salvador do Mundo,
Bardez, Goa.
- Appellants.

V/s

Mr. Dayanand Vassudev Kundaikar,
son of Vassudev Babani Kundaikar,
aged about 39 years, driver,
residing at Quitula,
Salvador do Mundo, Bardez, Goa.

..... Respondent.

Mr. M. B. D'Costa, Senior Advocate with Mr. J. A. Lobo, Advocate for the appellants.

Mr. E. P. Lobo, Advocate for the respondent.

CORAM : P.V. KAKADE, J.

Date of reserving the Judgment :
18.8.2006.

Date of pronouncing the Order :
7th October, 2006.

JUDGMENT:

Heard learned Counsel for both the parties. Perused the record.

2. The appellants-plaintiffs have filed this appeal against the Judgment and Order passed by the Civil Judge, Sr. Division, Mapusa dated 21.8.2002, dismissing the suit for damages/compensation.

3. The facts involved in the dispute, in a nutshell, are thus :

The plaintiffs are brother and sister of each other and landlords. They are staying in House No. 356 at Quitula, Salvador do Mundo. Conceicao Marta Fernandes has a property which is next to the property and the house of the plaintiffs and the defendant is staying in the property of the said Conceicao. On 23.12.1981, the defendant lodged a false complaint to the Mapusa Police saying that the plaintiffs had assaulted him. The defendant also stated in the complaint that while he was removing the leaves, the first plaintiff came and assaulted him and the second plaintiff caught-hold of him, as a result of which they were arrested on 24.12.1981, but they were released on bail. The charge-sheet was filed bearing No.23/82 dated 15.2.1982 and Criminal Case No.53/82 in the Court of the Judicial Magistrate, First Class, at Mapusa came to be filed. After framing charge for the offence of assault, the plaintiffs finally were

acquitted by the order of the Criminal Court dated 28.4.1999. The alleged weapon of assault i.e. scythe was attached in the course of investigation. The plaintiffs alleged that the defendant was always harassing the plaintiffs and the criminal complaint resulted in acquittal as there was not a single eye witness to the incident and the prosecution failed to prove the case against the plaintiffs.

It is the case sought to be made out on behalf of the plaintiffs that the arrest and the prosecution of the plaintiffs was made known to the entire Village of Salvador do Mundo. The first plaintiff was a Sarpanch of the Village and was elected in the years 1967 and 1972 and was also elected in the year 1981 till 1986 and, according to the first plaintiff, he could not contest the election subsequently due to the police complaint filed by the defendant and thereby the first plaintiff's reputation was affected. The first plaintiff was Matriculate in 1941 in Bombay and has worked in gulf, as well as in Bombay; whereas the second plaintiff is Matriculate and was a teacher in St. Philomena High School, Salvador do Mundo till 1954. According to the plaintiffs, they were held in high esteem by the Villagers, but due to the defendant's malicious prosecution their reputation was lowered and they had to spend considerable amount for travelling to Court on various dates and, therefore, were entitled for damages to the extent of Rs.2,00,000/-, besides the amount of Rs.15,000/-

for Advocate's fees, Rs.5,000/- towards transport, Rs.1,25,000/- towards loss of reputation of the first plaintiff and Rs.55,000/- towards the loss of reputation of the second plaintiff. For all these purposes, a legal notice was issued on 17.7.1999 calling upon the defendant to pay Rs.2,00,000/- with interest at the rate of 18 % per annum, but the defendant did not respond and hence, the suit came to be filed.

4. The defendant appeared in response to the suit summons and filed written statement, inter alia, denying the allegations made by the plaintiffs. It was submitted on behalf of the defendant that the plaintiffs had no cause of action to file the suit and further denied that the plaintiffs had suffered any loss of reputation. According to the defendant, the plaintiffs were acquitted by the Criminal Court by giving benefit of doubt though, in fact, the question of assault had occurred, in respect of which the criminal complaint came to be filed by the defendant and on such and other grounds, the suit was sought to be dismissed with costs.

5. The learned trial Court, on the basis of the pleadings of both the parties and the evidence led by them, settled the issues and proceeded to try the suit. On the basis of the available material, the trial Judge came to the conclusion that the plaintiffs failed to prove that the defendant had

maliciously prosecuted the plaintiffs. Further it was held that the plaintiffs failed to prove that they had suffered loss and damage to the extent of Rs.2,00,000/- and finally dismissed the suit and hence, the present appeal.

7. At the outset, it may be noted that it was submitted on behalf of the appellants-plaintiffs that the evidence led by the plaintiffs, through their witnesses, showed that the plaintiffs had proved the fact that the defendant had maliciously prosecuted the plaintiffs, especially when no evidence was led on behalf of the defendant to rebut the same and, therefore, it was submitted that it was a fit case to draw an adverse inference against the defendant in order to hold that the plaintiffs proved that their prosecution was with malicious intention. In this regard, the law is very settled to the effect that in a suit for damages for defamation of character, the plaintiff must start his case by showing that he was not guilty of the offence charged. In a defamation suit, if the occasion is privileged, the onus is on the plaintiff to show actual malice. In an action for damages for malicious prosecution, the plaintiff has to prove absence of reasonable and probable cause and malice on defendant's part and that he was innocent of the charge. In other words, the onus is not on the defendant to show that there was reasonable and probable cause, but on the plaintiff to prove its absence. In the present case before us, on critical perusal of the entire

evidence of the witnesses of the plaintiffs, it is quite apparent that none of them are reliable in order to hold that the defendant harboured any malice in his mind against the plaintiffs while filing the police complaint. In fact, the entire criminal proceeding was brought on record which shows that the incident took place on 17.12.1981, for which the complaint came to be filed on 23.12.1981. Initially, the said complaint was treated as non-cognizable, but finally charge-sheet came to be filed and investigation was made, in which course a weapon of offence i.e. scythe was attached and produced before the Court. The medical evidence also was led which showed that the defendant suffered fracture of left hand bone. In other words, the evidence involved in the episode leaves no doubt that the incident of assault did take place at the said time and place, however, the plaintiffs were given benefit of doubt and were acquitted. In other words, it was not a clear case of acquittal, nor could it be said that a false case was lodged against the plaintiffs by the defendant only with intention to harass the plaintiffs in order to defame them in the eye of the society. As we have seen earlier, it was for the plaintiffs to prove that the defendant harboured any malice in his mind against the plaintiffs and the complaint came to be filed, in which task, the plaintiffs have completely failed and, therefore, in my considered view, the learned trial Judge has rightly held that the plaintiffs failed to prove that the defendant maliciously prosecuted them.

The learned Counsel for the appellants sought to put reliance on the Judgment of the Single Judge of this Court in the case of ***Vishweshwar Shankarrao Deshmukh and anr. vs. Narayan Vithoba Patil***, 2005(2) Bom. C.R. 491. Perusal of the said Judgment clearly shows that it is not applicable to the present set of circumstances involved in this case. In the case under ruling, it was proved that the defendant had hatched a conspiracy to involve the plaintiff in criminal prosecution which event is not available in this case. The case under ruling is not applicable to the present case, as the facts and circumstances involved in that case are totally different from those involved herein.

Similarly, the evidence of the plaintiffs' witnesses also failed to show that the reputation of the plaintiff received setback by the said prosecution. In fact, all the witnesses of the plaintiffs appear to be quite interested witnesses and, therefore, it would not be safe to rely upon them to hold that the defendant prosecuted the plaintiff maliciously.

8. For the reasons recorded above, I am inclined to hold that the reasonings adopted and the findings recorded by the learned trial Judge appear to be just, legal and proper and and, therefore, no interfere is called for.

In the result, the appeal stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.